

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

AUGUST 8, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0084

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL GARY LOCKE,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Burnett County:
ROBERT H. RASMUSSEN, Judge. *Reversed and cause remanded directions.*

MYSE, J. The State of Wisconsin appeals the sentence imposed following Michael Gary Locke's conviction for possession of an untagged deer carcass in violation of § 29.40(2), STATS. The State contends that the trial court was without authority to deviate from the minimum sentence prescribed by § 29.99(11), which provides for a fine of not less than \$1,000 and the revocation of all approvals issued to Locke under ch. 29, STATS., including hunting and fishing licenses. Because this court concludes that the trial court is required to impose the minimum mandatory sentence and its failure to do so is error, the sentence imposed is reversed and the matter remanded for resentencing in accordance with the statutorily required sentence.

There is dispute between the State and Locke as to the circumstances leading to the issuance of two citations for possession of an untagged deer carcass.¹ However, no one disputes Locke's conviction on one count of violating § 29.40(2), STATS.² Locke was convicted after pleading guilty to one count in exchange for the State's agreement to dismiss the other citation. The trial court imposed a sentence of a \$500 fine and also ordered Locke to donate \$1,000 to a local food pantry. The court explicitly stated it would not revoke Locke's hunting and fishing privileges.

The sole issue on appeal is whether the trial court has the authority to deviate from the minimum mandatory sentence created by § 29.99(11), STATS. This is a matter of statutory construction, which presents a question of law that this court decides independently and without deference to the reasoning of the lower courts. *State v. Braun*, 185 Wis.2d 152, 161, 516 N.W.2d 740, 743 (1994).

The resolution of this issue is clearly controlled by precedent in this state. The principle that a court is without authority to impose any sentence other than the mandatory sentence was announced in *State v. Stang Tank Line*, 264 Wis. 570, 59 N.W.2d 800 (1953). In *Stang Tank Line*, the trial court failed to impose the mandatory sentence for operating a truck in excess of the statutory weight limit, imposing instead a reduced penalty at the recommendation of the district attorney and arresting officer. Upon review, our supreme court held

¹ The State contends that Locke was engaged in an elaborate scheme to poach deer that included the use of bait as well as lights that allowed the hunter to shoot from the cabin. Locke on the other hand contends that in two isolated incidents he shot one deer for his son-in-law and one deer for his grandson's friend who was unable to join in the hunt due to a brain tumor. The resolution of this factual dispute is irrelevant to the single legal question presented to this court for review.

² Section 29.40(2), STATS., provides:

DEER TAGS. Except as provided under sub. (5) and s. 20.405 (3), any person who kills a deer shall immediately attach to the ear or antler of the deer a current validated deer carcass tag which is authorized for use on the type of deer killed. Except as provided under sub. (2m) or s. 29.578 (7), (8) or (14), no person may possess, control, store or transport a deer carcass unless it is tagged as required under this subsection.

that the court could not usurp the legislative and executive fields by refusing to impose the prescribed sentence. *Id.* at 573, 59 N.W.2d at 801.

The supreme court has since reaffirmed its holding that a court must impose mandatory sentences where the legislature has provided them. *State v. Monona*, 63 Wis.2d 67, 72, 216 N.W.2d 230, 232 (1974) (while court may impose a forfeiture less than that demanded by the plaintiff, there is no authority for court to impose less than the statutory minimum); *State v. Duffy*, 54 Wis.2d 61, 65, 194 N.W.2d 624, 626 (1972) (statute requiring that persons convicted shall be imprisoned not less than five days left court with no alternative but to impose the sentence).

Locke argues that courts have the power and the obligation to impose fair, reasonable and appropriate sentences in all cases. He urges this court to authorize the trial court's exercise of discretion to achieve these principles of justice. While Locke's argument addresses a major concern that arises when the legislature imposes mandatory minimum sentences, this court cannot release the trial court from its clear obligation to impose the minimum sentences established by law. See *Duffy*, 54 Wis.2d at 65, 194 N.W.2d at 626.

In this case, § 29.99(11), STATS., provides that any person who violates § 29.40 shall be punished by a fine of not less than \$1,000 nor more than \$2,000 or by imprisonment for not more than six months or both. Subsection (11) also states: "In addition, the court *shall* order the revocation of all approvals issued to the person under this chapter and shall prohibit the issuance of any new approval under this chapter to the person for 3 years." (Emphasis added.) The use of the directive "shall" in this section obligates the trial court to impose a sentence of no less than the minimum proscribed by statute. The trial court's failure to do so is error, and this court is required to reverse the sentence imposed and remand so that the trial court can impose the minimum sentence provided by law. In this case, the fine must be not less than \$1,000 and all approvals issued under ch. 29, STATS., must be revoked. The trial court must also prohibit the issuance to Locke of any new approval for three years. No sentence involving lesser punishment is authorized by law. Accordingly, the sentence imposed is vacated and the matter remanded for the imposition of sentence in accordance with this decision.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.